

STIPULATIONS

The stipulations as set forth in the Award of the Special Administrative Law Judge are herein adopted by the Appeals Board.

ISSUES

Respondent admits accidental injury arising out of and in the course of claimant's employment for the injuries suffered to claimant's neck but denies post traumatic depression and headaches resulting from that injury.

The remaining issue for the Board to decide is the nature and extent of claimant's injury and disability.

Also at issue at the Administrative Law Judge level is the liability of the Kansas Workers Compensation Fund. The Administrative Law Judge found no liability and this issue was not appealed by the respondent. The Appeals Board was advised by the respondent's attorney that the Fund was being dismissed at the time of oral argument and Mr. Nodgaard, the attorney for the Fund, did not participate in oral argument before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire evidentiary record, including the stipulations of the parties, the Appeals Board makes the following findings of fact and conclusions of law:

On July 27, 1992, while working as a sheet metal worker for Boeing, claimant was struck in the head by a door. The record is contradictory as to whether claimant lost consciousness or not but claimant did suffer injury to his neck and head and was transported to the hospital by ambulance. Claimant was off work, receiving medical care, through May 1993. In May 1993, claimant was returned to work as a sheet metal worker for Boeing at a different job location. His responsibilities have changed somewhat but claimant is working full time at a comparable wage at this time.

Subsequent to the injury, claimant alleges he developed significant physical and psychological problems stemming from this injury. Claimant currently experiences headaches on a regular basis, is noise intolerant at work, suffers from depression, a marked lack of energy, disturbed sleep, loss of interest in physical activities including sports, is having significant difficulties with his wife and is suffering from sexual dysfunction. He alleges none of this existed prior to the injury suffered on July 27, 1992.

Claimant is in his second marriage, with his first marriage having ended in divorce. He has two children from his first marriage, including a teenage daughter who is currently unmarried and pregnant. Claimant also had financial problems prior to the head injury and experienced difficulty in paying child support to his first wife. Claimant alleged these situations did not bother him prior to the injury but currently cause him a great deal of distress.

Currently claimant participates in pool with his friends, periodically goes out to dinner with his family and goes to the dog track where he gambles. Claimant does nothing athletic but does participate in work on a regular basis. Claimant alleges difficulty doing

his job due to short-term memory loss. He also alleges his co-workers tell him on a regular basis that he makes mistakes on the job.

Claimant's manager, Mr. Larry Leo, advises that claimant is an average worker who, after first returning to work from the injury, had headaches for a period of time. The headaches and depression have since disappeared according to Mr. Leo's observations. Mr. Leo says claimant works with a gentleman named Jesse who is an outstanding employee and apparently is very critical of other workers. Jesse has not complained to Mr. Leo that claimant is not doing his job. Claimant is supervised by a gentleman by the name of Alan Schmidt, who is responsible for claimant's daily activities. Mr. Schmidt has not advised of any problems claimant has experienced in his work. Further, claimant has not been counseled or warned regarding the quantity or quality of his work since his return to work at Boeing. Claimant is receiving wages comparable to those being paid prior to the 1992 head injury.

Claimant is currently being treated by Brian E. Romalis, M.D., a Wichita psychiatrist. Dr. Romalis performed numerous neurological exams on claimant, all of which were normal. He did find claimant to have headaches which cannot be verified by testing. Claimant exhibited a lack of energy, disturbed sleep, loss of drive, loss of interest in play or work, blurred vision when tired, and sexual dysfunction with his wife. He found claimant to be mentally alert, coherent, and oriented to time and place and person during his examination and treatment. He said claimant is suffering from depression, although he is not suicidal. Dr. Romalis attempted joint sessions between claimant and his wife, which proved to be unfruitful. Apparently the couple had great difficulty communicating.

Dr. Romalis assessed claimant at a forty percent (40%) functional impairment, based upon the depression and headaches, opining that he used the American Medical Association Guides to Permanent Impairment in reaching this opinion. Dr. Romalis was asked about objective evidence to support his diagnosis and he advised that since all of claimant's neurological tests were normal there was no way objectively to diagnose claimant's condition. He advised that the forty percent (40%) rating came from DSM-III-R, which is a psychological medical publication used in diagnosing and rating persons with closed head injuries. He feels claimant's 1992 head injury coupled with a prior head injury in 1989, claimant's child support problems, financial problems, and marital discord, all led to claimant's current psychological and physical difficulties. When asked about continued treatment, Dr. Romalis advised claimant should be involved in an indefinite treatment program and he was not optimistic about claimant's future recovery. He felt claimant needed support maintenance comprised of psychological treatment and care for an indefinite period of time.

Claimant had earlier been rated at seven percent (7%) to the body as a whole by Dr. Blaty for the injury to his neck. Dr. Romalis included the seven percent (7%) rating in his forty percent (40%) permanent partial impairment to the body as a whole.

Claimant was examined and tested by Mitchel Woltersdorf, a Ph.D. in psychology, with his post-doctorate in neuropsychology, psychiatry and behavioral sciences. He is currently the director of the psychology department at Wesley Medical Center and an adjunct professor at both Wichita State University and Friends University in psychology and physical therapy. He tested claimant on two separate occasions, December 1992 and November 1993. His physical examination of claimant failed to indicate any diagnosable problems as all of claimant's neurological tests were normal.

He conducted several psychological tests on claimant in December 1992 and November 1993. In 1992 the test showed claimant to be experiencing neck pain, dizziness, cold hands, forgetfulness, fatigue, sleep difficulties and loss of enjoyment of activities including sexual dysfunction. Dr. Woltersdorf found this to be consistent with mild head injury. He found claimant's intellectual functions, memory functions, complex problem solving and other associated tasks to be essentially without dysfunction.

A second battery of tests performed by Dr. Woltersdorf were specifically intended to test claimant's intellectual ability. He administered the Wechsler Intelligence Scale in December 1992 but did not repeat the same in 1993 because, with a mild head injury and no loss of consciousness, he felt the Wechsler battery would not have been affected. He did, on both occasions, administer a test called the digit span, which tests auditory attention. This test requires focused attention and is usually easily affected by a head injury. He had anticipated claimant would show improvement in this test since claimant was recovering physically. Instead, claimant's test worsened considerably. In 1992 claimant scored an IQ equivalent of eighty (80), while in November 1993 he scored an IQ equivalent of forty (40). Dr. Woltersdorf could not explain this decrease. The only explanation, he felt, was some distinct process separate from the head injury or the claimant's attempt to magnify his deficit. He also administered an academic achievement test, a very common test, utilizing words such as house, cat, etc. Even people with severe head injuries and months of coma do not lose academic abilities. Claimant, in 1992, tested in the tenth-grade level in reading but tested only in the fifth-grade level in 1993. There was nothing to account for this decline. Even Alzheimer's patients do not suffer this type of decline. Claimant did show good improvement in the Wechsler memory battery, going from fifty-nine percent (59%) to sixty-eight percent (68%) from 1992 to 1993. This indicated improvement from claimant's mild head injuries. He next tested claimant's neuropsychological functioning utilizing a non-verbal test. He again felt that claimant should show improvement and when claimant suffered a decline in his abilities during this test, he had no explanation for same.

In testing claimant's sensory perceptual functions, the claimant showed a marked decline which was a dramatic switch from the first test to the second. The doctor was dumbfounded as to how there could have been such a significant decrease in claimant's perception abilities. He tested claimant for right/left-hand dominance, with claimant being right-hand dominant in 1992 but left-hand dominant in 1993. Dr. Woltersdorf was unable to explain this switch, describing it as not being possible.

Dr. Woltersdorf performed several tests to pinpoint whether claimant was malingering or attempting to exaggerate his symptoms. One of these tests which the doctor called an ABC test, required claimant look at fifteen (15) objects on a card and memorize same. Claimant was then asked to identify the fifteen (15) objects. In 1992 he was capable of identifying fifteen (15) out of fifteen (15). Thirty minutes after the test claimant was again asked to identify the objects and was capable of identifying twelve (12) out of fifteen (15) which the doctor felt was a good result. Even Alzheimer's patients were capable of getting nine (9) of the objects on both first and second try. When this test was repeated in November 1993, claimant was capable of only recalling six (6) objects immediately and thirty minutes after the test, could remember none of the objects. This test result would have placed claimant even lower than an Alzheimer's patient which Dr. Woltersdorf felt supported his opinion that claimant was malingering and attempting to exaggerate his symptoms.

Dr. Woltersdorf felt claimant was unimpaired from working in terms of cognitive deficit and emotional stability. He agreed there is no way to test for headaches when all neurologic tests are normal. Dr. Woltersdorf felt claimant had no functional impairment as a result of the symptoms described, attributing many of claimant's problems to suspected malingering on claimant's part.

"In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends." K.S.A. 44-501(a).

K.S.A. 44-508(g) defines burden of proof as follows:

"'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence. Box v. Cessna Aircraft Co., 236 Kan. 237, 689 P.2d 871 (1984).

It is the function of the trier of fact to decide which testimony is more accurate and/or credible and to adjust the medical testimony along with the testimony of the claimant and any other testimony that may be relevant to the question of disability. The trier of fact is not bound by medical evidence presented in the case and has a responsibility of making its own determination. Tovar v. IBP, Inc., 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991).

K.S.A. 1992 Supp. 44-510(e) states in part:

"Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence."

Dr. Romalis opined claimant's injury, including the psychological problems, resulted in a forty percent (40%) functional impairment to the body as a whole. Dr. Woltersdorf, on the other hand, felt that claimant suffered no functional impairment as a result of his ongoing psychological problems finding the support for said such psychological problems to be questionable. He further opined claimant's problems may stem from claimant's intentional attempt to manipulate his condition. As the trier of fact, the Appeals Board must decide the more accurate and/or credible testimony and base its decision on same. In reviewing the medical records the Appeals Board finds the testing and evaluations done by Dr. Woltersdorf to be more credible and persuasive when considering the issue of claimant's functional impairment and its relationship to his injury with respondent. As such the Appeals Board finds that claimant has failed to prove by a preponderance of the credible evidence that claimant's psychological problems are related to his head injury suffered at Boeing.

The functional impairment stipulated to by the parties from Dr. Blaty, appears to adequately express the loss of physiologically capabilities suffered by claimant on the date

of injury. As such the Appeals Board finds claimant is entitled to a seven percent (7%) permanent partial impairment of function to the body as a whole.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Special Administrative Law Judge William F. Morrissey, dated May 12, 1994, shall be and is modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of claimant, Kevin Nguyen, and against Boeing Military Airplane, and Aetna Casualty & Surety Company, for an accidental injury which occurred July 27, 1992, and based on an average weekly wage of \$735.46, for 46 weeks of temporary total disability compensation at the rate of \$299.00 per week in the sum of \$13,754.00 followed thereafter by 369 weeks of compensation at the rate of \$34.32 in the sum of \$12,664.08 making a total award of \$26,418.08 for a 7% permanent partial general body impairment of function.

As of January 29, 1995, there is due and owing claimant 46 weeks of temporary total disability compensation at the rate of \$299.00 per week in the sum of \$13,754.00 followed thereafter by 85 weeks permanent partial disability compensation at the rate of \$34.32 per week in the amount of \$2,917.20 for a total of \$16,671.26 due and owing in one lump sum less any compensation previously paid. Thereafter the remaining 284 weeks permanent partial disability compensation shall be paid at the rate of \$34.32 per week in the sum of \$9,746.88 until fully paid or until further order of the Director.

Future medical for claimant's physical injury will be awarded upon proper application to and upon approval by the Director.

Authorized medical expense incurred to date of this award and unauthorized medical expense up to \$350.00 is ordered paid upon presentation of an itemized statement verifying same.

The claimant's contract for attorney fees is hereby approved insofar as it is consistent with K.S.A. 44-536.

The Kansas Workers Compensation Fund was dismissed from this matter by agreement of the parties and will be responsible for its own attorney fees.

Fees necessary to defray the expense of the administration of the Workers Compensation Act are assessed against the respondent and the insurance carrier equally to be paid as follows:

William F. Morrissey Special Administrative Law Judge	\$150.00
Barber & Associates	
Transcript of Regular Hearing	\$192.95
Transcript of Regular Hearing (Cont'd)	\$175.00
Deposition of Brian Romalis, M.D.	\$239.20

Deposition of Mitchel Woltersdorf
Deposition of Larry Leo

\$240.20
\$125.00

IT IS SO ORDERED.

Dated this ____ day of February, 1995.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

cc: Gary E. Patterson, Wichita, KS
Eric K. Kuhn, Wichita, KS
William F. Morrissey, Special Administrative Law Judge
George Gomez, Director